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JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1905.

ALABAMA AND VICKSBURG RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI,
DEFENDANT IN ERROR.

No. 97

Motion to dismiss writ of error or to affirm the judgment of the court below, together with brief of defendant in error on said motion.

MONROE McCLURG,
HANNIS TAYLOR,
Counsel for Defendant in Error.

PRESS OF GIBSON BROTHERS.
WASHINGTON, D. C.
1905.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ALABAMA & VICKSBURG RAILWAY COMPANY, *Plaintiff in Error*,

v.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *Defendant in Error.*

No. 371.

Motion to dismiss writ of error or to affirm the judgment of the court below.

Now comes the above-named defendant in error, by its counsel, and moves the Court on the record herein:

1. To dismiss the writ of error herein for want of jurisdiction in this court.

2. To affirm the judgment of the Supreme Court of the State of Mississippi, the review of which is sought by the writ of error herein, upon the ground that the rulings, decision and judgment of the said court are obviously correct, and upon the further ground that even if the record shows jurisdiction in this court it is manifest that the writ of error herein was taken for

delay only and the question upon which jurisdiction depends is so frivolous as to need no further argument.

Respectfully submitted,

MONROE McCLURG,
HANNIS TAYLOR,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ALABAMA & VICKSBURG RAILWAY COMPANY, *Plaintiff in Error*,

v.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *Defendant in Error.*

No. 371.

SIR:

Please take notice that the defendant in error in the above action will, on the 11th day of December, 1905, at twelve o'clock, noon, on said day at the opening of said court, or as soon thereafter as counsel can be heard, at the Supreme Court Room, in the City of Washington, District of Columbia, in open court move this court on the record herein:

1. To dismiss the writ of error herein for want of jurisdiction in this court.

2. To affirm the judgment of the Supreme Court of the State of Mississippi, the review of which is sought by the writ of error herein, upon the ground that the rulings, decision and judgment of the said Supreme

Court of Mississippi are obviously correct, and upon the further ground that even if the record shows jurisdiction in this court, it is manifest that the writ of error herein was taken for delay only and the question, upon which jurisdiction depends, is so frivolous as not to need further argument.

Together with this motion the defendant in error serves upon the plaintiff in error a copy of his brief of argument.

Dated Washington, November 14, 1905.

MONROE McCLURG,
Counsel for Defendant in Error,
Greenwood, Mississippi.

HANNIS TAYLOR,
Counsel for Defendant in Error,
2018 O Street N.W.,
Washington, D. C.

To HARRY H. HALL, Esq.,
General Counsel Queen and Crescent Route,
New Orleans, La.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ALABAMA & VICKSBURG RAILWAY COMPANY,
Plaintiff in Error,

v.

THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.
Defendant in Error.

No. 371

In Error to the Supreme Court of the State of Mississippi.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

I.

STATEMENT OF THE CASE.

The plaintiff in error, the Alabama & Vicksburg Railway Co., a corporation created by the State of Mississippi, avers that it is "engaged in the operation of a railroad for the transportation of passengers and freight between the cities of Vicksburg and Meridian

in said State, a distance of one hundred and forty miles, which constitutes the whole of its line." The defendant, the Railroad Commission of Mississippi, is a governmental agency of that State which derives its powers from its Annotated Code of 1892, defining the functions of said Commission in a series of sections extending from Sec. 4273 to Sec. 4336, both inclusive. Sec. 4297 provides that "The commission shall docket, hear, and determine all complaints made of any time schedule, or of the tariff of rates, joint or several, made by any railroad, or fixed or approved by the commission, on the ground that the same, in any respect, is, in the case of time schedule, unnecessarily inconvenient for the public or, in the case of a tariff of rates, that the charges are for more than just compensation, *or that such charges, or any of them, amount to, or operate so as to effect unjust discrimination*," etc. On December 13, 1902, the board of trade of Meridian presented to the Railroad Commission in question a petition praying that a proportionate rate of three and one-half cents per cwt. then in effect from Vicksburg to Meridian, over the line of appellant be made an open rate subject to the use of all shippers from Vicksburg. The rate referred to in the petition was a rate on grain and grain products handled in carload lots. This class of freight, under the guise of a "re-billing rate," was transported from Vicksburg to Meridian at the rate of three and one-half cents per cwt. The rate in question had been established by the voluntary action of the appellant, but with it was coupled a condition which made its practical working a very great advantage to those receiving freight over the Vicksburg, Shreveport and Pacific Railroad, and an unjust discrimination against all but that specially favored class. The condition

which worked this discrimination consisted of a limitation of the "re-billing" rate to those receiving freight over the Vicksburg, Shreveport & Pacific Railroad, there being only one other connecting line of railroad at Vicksburg. A true re-billing rate is one in which goods received in unbroken carload lots over one line of railway can be re-billed over the same or another line completing one continuous trip of the same commodity, simply changing the consignee and altering the destination of the identical shipment without unloading or handling of freight. What is demonstrated a re-billing rate in this record, does not, as actually employed, comply with the definition above given, in several most important particulars. In the first place, the rate is not applied to consignments arriving over all connecting lines, but is only available to those receiving freight over a single railroad, the Vicksburg, Shreveport & Pacific Railroad. In the second place, the freight re-consigned over the Alabama & Vicksburg Railway line did not complete one continuous trip, without handling or unloading, and was not necessarily, or even generally, the identical shipment which was originally consigned to the merchant in Vicksburg—it being the custom for the dealer in Vicksburg handling freight over the Vicksburg, Shreveport & Pacific Railroad Co. to save his "expense bills" (or receipts showing the amount of freight which he had received over that line) so that he might be granted the privilege within ninety days from the date of such receipts, of shipping freight of an equal quantity over the line of appellant at the re-billing rate of three and one-half cents per cwt. Thus a merchant receiving a carload of oats over the Vicksburg, Shreveport & Pacific Railroad could, within ninety days of that date, ship over appel-

lant's line a carload of corn or other grain product without regard to the source from which it was procured. The result of that arrangement was that the merchant in Vicksburg who patronized the Vicksburg, Shreveport & Pacific Railroad Co. could receive any amount of grain product by barge or otherwise, and keep it stored in warehouse with the full assurance that he could at any time within the period stated have the advantage of this cheap rate, over appellant's line, whereas the merchant not dealing with this specially favored "associated line" was denied the same rate. In order to remedy that gross discrimination an appeal was made to the Railroad Commission of Mississippi, which made an order converting the so-called re-billing rate into an open or flat rate, with the result that all dealers handling grain or grain products in carload lots could enjoy the rate then in force from Vicksburg to Meridian. The existing rates were left undisturbed, *the only change wrought by the order being the abolition of the condition precedent insisted on by the appellant restricting the rate to the exclusive benefit of such as had received previous and equal shipments over its associated line.* In passing upon the validity of that order the Supreme Court of Mississippi said: "'That is the exact status of the order presented to us for review. A tariff or rates had been established by the voluntary action of the railroad company; that tariff operated to work unjust discrimination; complaint was made; the proof fully supports the justice and truth of the grounds on which the complaint is based; *that proof satisfied the chancellor, and it satisfies us, that the so-called re-billing arrangement was simply a cloak assumed to conceal an arrangement which, while ostensibly granted as a concession to the Vicksburg dealers, was in truth, devised for the*

ulterior purpose of fostering the interests of the Vicksburg, Shreveport & Pacific Railroad Company, perhaps, as it is argued, to maintain present rates to Meridian for the benefit of an associated and connecting railroad at that point. In such state of case the power of the Commission to make any change which justice may demand is unquestionably so well established that we deem any citation of authorities further than a reference to the briefs of counsel, a work of supererogation."

II.

Power of a State to Regulate Traffic Within its Limits, not Strictly Interstate.

Nothing is better settled than the power of a State to regulate traffic carried on within its limits, not strictly interstate. Postal Telegraph Cable Co. *v.* Charleston, 153 U. S. 692. A railroad corporation largely engaged in interstate commerce is amenable to state regulation and taxation as to any of its service which is wholly performed within the state, and not as a part of interstate service. New York *ex rel.* Penna. R.R. Co. *v.* Knight, 192 U. S. 21; Pullman Co. *v.* Adams, 189 U. S. 420; Kehrer *v.* Stewart, 197 U. S. 67. The Supreme Court of Mississippi held that the re-billing rate, so-called, involved in this case was in fact a local rate; that the Railroad Commission had the power to make the order that the re-billing rate be made a local rate, in order to prevent discrimination; that the subterfuge employed "was simply a cloak assumed to conceal" the discrimination. In New York *ex rel.* Penna. R.R. Co. *v.* Knight, this court said: "But when service is wholly within a state, it is presumably subject to state control. *The burden is on him who asserts that, though actually*

within, it is legally outside the state; and unless the interstate character is established, locality determines the question of jurisdiction." In Osborne *v.* Florida, 164 U. S. 654, this court said: "The particular construction to be given to this state statute is a question for the state court to deal with, and in such case as this we follow the construction given by the state court to the statute of its own. Leffingwell *v.* Warren, 2 Black, 599; New York *v.* Weaver, 100 U. S. 539; Noble *v.* Mitchell, 164 U. S. 367, and cases there cited. The Supreme Court of Florida has construed the 9th section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company, which is interstate in its character; that it applies to and affects only its business which is done within the state, or is, as is termed 'local' in its character, and it has held that, under that statute, so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question." There is no possible ground upon which it can be held that the order of the Railroad Commission in question put any additional burden or impediment upon interstate commerce, even if the traffic in question could be proven to be such. It was not such; it was simply intra-state traffic carried on by a state corporation within its limits, and as such intra-state traffic was subject to state control. Such was the decision of the highest court of the state when construing the state statute, and this court will, under the rule laid down in Orborne *v.* Florida, "follow the construction given by the state court to the statute of its own." The writ of error should, therefore, be dismissed, because the question decided by the state court is one over which this court has no jurisdiction.

III.

A Vain Attempt to Inject Federal Questions into this Record.

The appellant attempted to inject federal questions into this record by urging the following contentions: *First*, that inasmuch as its intra-state business only yields a certain stated percentage, less than one-half, of its gross revenues, that it does not in fact pay the expenses of maintaining and operating its road within the borders of the state, and therefore a reduction of existing rates is an indirect placing of a burden on inter-state business. To that contention appellee replied that it was not shown with any degree of certainty the proportionate amount of the gross expenses of the rail-road company incurred on account of the intra-state business, but that that amount was only arrived at by estimation, and, therefore, the appellate court of the state could not say as a matter of fact in the absence of positive proof, that the intra-state business of the appellant did result in a net loss, and as the findings of the Railroad Commission were to be dealt with as being *prima facie* correct, in the absence of direct proof of error, that the appellate court of the state should affirm its findings of fact. *Second*, appellant further contended that the hauling of grain and grain products at a flat or open rate of three and one-half cents per hundred pounds would produce less than the actual cost of transporting the freight, so that the more business of this character the appellant handles the greater its loss. It is therefore claimed that this is in effect the taking of the property of appellant without due process of law. To that contention appellee replied that the

figures shown in the record do not prove that freight handled in the usual and customary course of business as freight trains are ordinarily constructed, at the established rate, would result in a loss. But no matter how that may be as a matter of fact, the defense is worthless as a matter of law. Such was the result of the decision of this court in Pullman Co. *v.* Adams, 186 U. S. 420, where it was said: "The company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the state was merely a burden on its commerce between the states, while at the same time, it argued, it was compelled to assume that burden by Sec. 195, of the Constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned Sec. 3387 unconstitutional are the errors assigned." This court held that there was no error, and the judgment of the Supreme Court of Mississippi, upholding the right of that state to control the local business of the Pullman Co. within its limits, was affirmed. The foregoing statement of the contentions presented by appellant, in its effort to inject federal questions into this record, has been made for a single purpose, and that is to show to this court that such contentions were not necessarily involved in the decision of the state court, which, for that reason, ignored them. After stating such contentions the Supreme Court of Mississippi said: "*We decline to enter*

upon a discussion of either question, neither is necessarily involved in the decision of this case. It might be conceded that the intra-state business of the railroad results in a net loss, and might further be conceded that the transporting and handling of grain and grain products at the rate established, may not in actual operation bring a fair remuneration when limited to that one commodity, *nevertheless the rate having been established by the voluntary action of the appellant it must not be so enforced as to operate as an unjust discrimination against any one.* If the appellant chooses to establish as to a certain favored class of shippers a rate so low as to be unremunerative, justice demands, and the law will require, that the rate be granted to all alike. 'Special privileges to none' is the rule of action by which common carriers must measure their conduct." Record, pp. 106–107. It thus appears that the judgment of the Supreme Court of Mississippi simply upheld the Railroad Commission of that state in striking down, *within the limits of the state*, an unlawful discrimination in the application of a rate voluntarily established by appellant, a corporation whose termini are within the state. Certainly the decision of the state court, on that independent ground not involving a federal question, is broad enough to maintain the judgment, and for that reason it cannot be reviewed here. In California Powder Works *v.* Davis, 151 U. S. 389, 393, this court said that: "it is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the

cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented." See also, Isreal *v.* Arthur, 152 U. S. 362; Winter *v.* Montgomery, 156 U. S. 386; Missouri Pacific Ry. *v.* Fitzgerald, 160 U. S. 576; Seeberger *v.* McCormick, 175 U. S. 280. As this court has no jurisdiction to review the judgment in question, the writ of error should be dismissed.

The final judgment of the Supreme Court of Mississippi was rendered May 8, 1905. On July 7, 1905, the Chief Justice of that court filed what is called "Certificate of Chief Justice" in which he sets forth his personal views as to what was involved in the argument had before the court. Certainly such a paper is not a part of the record under the authority of Armstrong *v.* Athens County, 16 Pet. 281, wherein it was held that "in order to give this court jurisdiction under the 25th section of Judiciary Act of 1789, it must appear on the record itself to be one of the cases enumerated in that section; *and nothing out of the record certified to this court can be taken into consideration.*" All of which is respectfully submitted.

MONROE McCLURG,
HANNIS TAYLOR,
Counsel for Defendant in Error.